



Signed and Filed: May 24, 2011

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re ) Bankruptcy Case  
DEMIE BALAURO ACOSTA, ) No. 09-32339DM  
Debtor. ) Consolidated for  
Administration Only  
with Case No. 09-32340DM  
Chapter 11

MEMORANDUM DECISION REGARDING PAYMENT OF  
REAL ESTATE BROKER'S COMMISSIONS

I. Introduction

Debtor Demmie B. Acosta ("Debtor"), Marcus & Millichap Real Estate Investment Services, Inc. ("M&M"), Mark A. Mason ("Mason") and John M. Antonini ("Antonini") have asked the court to allow payment in full of real estate commissions in connection with Debtor's sales of real property on 17th Street ("17th Street Property") and 18th Street ("18th Street Property"; together "the Properties") in San Francisco even though the court authorized broker, M&M, did not comply with this court's order prohibiting it from representing both the seller (Debtor) and any buyer of the Properties. For the reasons explained below, the court will allow payment of one-half of the commissions due on the sales of each of the Properties, and subordinate the other half until creditors of

1 these affiliated debtors have been paid in full.<sup>1</sup>

2 II. Discussion<sup>2</sup>

3 On March 11, 2011, the court signed and on March 14, entered  
4 an Order Authorizing Employment Of Broker ("Employment Order")  
5 regarding the Properties. That order specifically recited that  
6 the Debtor is authorized

7 . . . to employ [M&M] as Real Estate Broker ("Broker") to  
8 list and sell or lease the Debtor's [Properties] . . . .

9 The order was submitted by Debtor's counsel and the court added  
10 the following:

11 Broker may not represent buyer in connection with the listing  
12 authorized by this order. See 11 U.S.C. § 327(a).<sup>3</sup>

13 As part of the Debtor's application to obtain the Employment  
14 Order, Mason submitted a declaration wherein he recited that he  
15 was a real estate agent at M&M, that he described as "Broker". He  
16 then recited that he understood Debtor desired to retain Broker to

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20 <sup>1</sup> M&M, in response to an invitation from the court, suggested  
21 by letter of May 16, 2011, that all commissions be paid other than  
22 one-half of its share (described as the "house side") of the two  
23 commissions otherwise payable to M&M and thereafter to be shared  
24 between Mason and Antonini. The court rejects that suggestion for  
25 the reasons explained in the text.

26 <sup>2</sup> The following discussion constitutes the court's findings  
27 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

28 <sup>3</sup> Section 327(a) of the Bankruptcy Code provides as follows:

29 Except as otherwise provided in this section, the  
30 trustee, with the court's approval, may employ one or more  
31 attorneys, accountants, appraisers, auctioneers, or other  
32 professional persons, that do not hold or represent an  
33 interest adverse to the estate, and that are disinterested  
34 persons, to represent or assist the trustee in carrying out  
35 the trustee's duties under this title.

1 perform the specific brokerage services.<sup>4</sup>

2 Notwithstanding the limitation on M&M's employment as  
3 Debtor's broker, Antonini, another agent employed by M&M,  
4 represented Paul Kraaijvanger as purchaser of the Properties.  
5 Antonini and Mason exchanged offers and counter-offers on the 18th  
6 Street Property.

7 At a hearing on April 22, 2011, the court considered the 18th  
8 Street Property sale. It noted that Mason and Antonini were both  
9 agents with M&M and that therefore M&M had violated the Employment  
10 Order. Nevertheless it approved the sale, but directed that the  
11 real estate commission claimed by M&M would be withheld pending  
12 further order. The court entered an order on May 10, 2011,  
13 approving the sale of the 18th Street Property (Docket No. 502).

14 At a hearing on May 13, 2011, the court orally approved the  
15 sale of the 17th Street Property to Mr. Kraaijvanger; as of the  
16 date of this Memorandum Decision, no order authorizing that sale  
17 has been submitted.

18 Thereafter, Debtor filed a request for payment of the  
19 commission due on the 18th Street Property sale. M&M filed a  
20 Memorandum of Points and Authorities and a supporting declaration  
21 of Mason with reference to the commissions due on both Properties.  
22 The issues are identical and the court thus treats all papers as  
23 relevant to the commissions due on both sales.

24 In support of the requests, counsel for M&M offered a  
25 declaration of Mason wherein he recites his twenty-two years  
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27 <sup>4</sup> The declaration also noted that M&M had been employed in  
28 connection with Debtor's efforts to sell three other properties in  
the San Francisco bay area.

1 experience as a real estate agent and claims to have believed that  
2 the reference to "Broker" in the Employment Order referred only to  
3 him personally, and not to M&M. This statement is contrary to  
4 Mason's previous declaration and the court is not prepared to  
5 write it off as a "layperson's mistake" as counsel for M&M has  
6 suggested. Antonini independently filed a declaration describing  
7 how he and Mason are fellow agents at the same broker, that they  
8 work independently of each other as separate agents, and that the  
9 18th Street Property transaction was strictly arms-length and  
10 subject to extensive and vigorous negotiations. Antonini did not  
11 say whether he knew or did not know of the court's prohibition  
12 against dual representation by M&M, so the court makes no finding  
13 in that regard.

14 M&M did not file a declaration of any responsible officer or  
15 licensed broker, but did file a memorandum conceding that an error  
16 had been made and that M&M should not have represented both buyer  
17 and seller. It adds that "this confusion will not happen again",  
18 an important assurance given that M&M is the listing broker on  
19 other properties Debtor owns.

20 Despite the conflicted representation by the two agents at  
21 the same brokerage, the following facts are undisputed: the  
22 efforts of M&M, Mason and Antonini benefitted the estate (assuming  
23 the two sales close). The prices were fair and reasonable.  
24 Further, Mason and Antonini acted in good faith. There is no hint  
25 of fraud or collusion. But M&M did not oversee its obligations as  
26 the listing broker and make sure its agents complied with the  
27 Employment Order in order to avoid the obvious conflict of  
28 interest addressed in section 327(a) and in the Employment Order.

1 Finally, Debtor's counsel may not have known specifically  
2 that Antonini was employed by M&M but because he played a  
3 significant role in bringing the sales of the Properties before  
4 the court, he should have noticed that the underlying agreement  
5 for the sale of the 18th Street Property did not identify a  
6 separate brokerage representing the buyer and he should have  
7 appreciated the distinction between the role of the broker of  
8 record and the role of the participating agents and either sought  
9 relief from the Employment Order or otherwise avoided the  
10 awkwardness of the court having to intervene to enforce its  
11 Employment Order.

12 California allows dual agency but it does not prohibit a  
13 seller or buyer from requiring that there be no dual agency in  
14 connection with a particular listing. While M&M is a prominent  
15 and respected real estate brokerage and perhaps is the best  
16 situated in San Francisco to handle sales such as these, it had  
17 the option of declining the engagement if it felt that a  
18 prohibition on dual agency was not appropriate. The court's  
19 order, by citing § 327(a) of the Bankruptcy Code, effectively  
20 prohibited dual agency; that prohibition was neglected by all who  
21 should have known better, leaving the court itself forced to  
22 insist on compliance with its order.

23 Throughout this case Debtor has contended that she is solvent  
24 and hopes to pay her creditors in full. That is a worthwhile  
25 goal, and indeed may come to pass. But it may not. Because the  
26 court views the provisions of section 327(a) of the Bankruptcy  
27 Code as part of the implementation of the fiduciary duties a  
28 Chapter 11 debtor has to her creditors, it will use its discretion

1 and limit M&M's fees at present (therefore the fees to be shared  
2 with Mason and Antonini) to what they would have received if a  
3 private seller had insisted upon a prohibition against dual  
4 agency. In other words, had M&M complied with the Employment  
5 Order, it would have likely shared one-half of the 5% commission  
6 payable on each of the two sales with another broker. Thus, the  
7 court will authorize M&M to be paid a commission of 2-1/2% of the  
8 selling price if and when each of the two sales close. Rather  
9 than tell M&M that it must forfeit a portion of the "house side,"  
10 the court prefers to let M&M deal with its own agents and to share  
11 with them the allowed commissions as it determines. The court  
12 will not engage in evaluating the relative responsibilities of  
13 M&M, Mason and Antonini for the problems that have arisen. That  
14 is their problem, not the court's or the Debtor's.

15 If Debtor is able to pay her creditors in full, then the need  
16 to invoke the fiduciary rules of the bankruptcy law is less  
17 critical, and Debtor will be free to pay conflicted real estate  
18 professionals then as she has sought to do now. The court will  
19 not disallow the remaining one-half of the two real estate  
20 commissions on the sales, but simply subordinate them such that  
21 they may be paid to M&M (and shared as M&M determines) if and when  
22 creditors have been paid in full.

### 23 III. Conclusion

24 Counsel for Debtor should submit a form of order directing  
25 payment of one-half of the reserved commission on the 18th Street  
26 Property to M&M upon close of escrow, with the remaining half to  
27 be treated as proceeds of sale subject to existing liens, and  
28 providing further that if and when creditors are paid in full in

1 this case, Debtor should pay an amount equal to the other one-half  
2 commission to M&M. In connection with the order to be presented  
3 in connection with 17th Street Property, the same provisions for  
4 payment of the real estate commission should be included in the  
5 form of order.

6 \*\*END OF MEMORANDUM DECISION\*\*  
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